

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

Kerry Garner, #143074	)	
	)	
Petitioner,	)	
	)	C/A No.: 3:13-cv-414-TLW
vs.	)	
	)	
Cecilia Reynolds,	)	
	)	
Respondent.	)	
_____	)	

**ORDER**

Petitioner Kerry Garner (“Petitioner”), proceeding *pro se* and *in forma pauperis*, filed this habeas petition pursuant to 28 U.S.C. § 2254. (Doc. #1). The matter now comes before this Court for review of the Report and Recommendation (“the Report”) filed on March 13, 2013, by Magistrate Judge Joseph R. McCrory, (Doc. #7), to whom this case was previously assigned. Plaintiff filed objections to the Report on April 4, 2013. (Doc. #10). In his objections, the Petitioner argues that his prior petition, which was dismissed as untimely, was not “adjudicated on the merits.” (Doc. #10 at 26). However, the case law does not support his position. See Quezada v. Smith, 624 F.3d 514 (2d. Cir. 2010) (holding that “dismissal of a § 2254 petition for failure to comply with the one-year statute of limitations constitutes an adjudication on the merits that renders future petitions under § 2254 challenging the same conviction ‘second or successive’ petitions under § 2244(b).”).

In the Report, the Magistrate Judge recommends dismissing the case without prejudice and without requiring Respondent to file an Answer or return. (Doc. #7). The Magistrate Judge also recommends denying a Certificate of Appealability. (Id.). In conducting this review, the Court applies the following standard:

The magistrate judge makes only a recommendation to the Court, to which any party may file written objections.... The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a de novo determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992)

(citations omitted).

In light of the standard set forth in Wallace, the Court has reviewed, de novo, the Report and the objections. After careful review of the Report and objections thereto, the Court hereby **ACCEPTS** the Report. (Doc. #7). The Plaintiff's objections are **OVERRULED**. (Doc. #10). The Plaintiff's case is **DISMISSED** without prejudice and without requiring Respondent to file an Answer or return. Additionally, the Court has reviewed this petition in accordance with Rule 11 of the Rules Governing Section 2254 Proceedings. The Court concludes that it is not appropriate to issue a Certificate of Appealability. Petitioner is advised that he may seek a certificate from the Fourth Circuit Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure.

**IT IS SO ORDERED.**

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s/Terry L. Wooten  
Chief United States District Judge

June 6, 2013  
Columbia, South Carolina